INCIDENTAL DAMAGE TO PERSONAL PROPERTY IN CONDEMNATION PROCEEDINGS.

In Mr. Lewis's treatise on Eminent Domain,[1] it is pointed out that "the law as to what constitutes a *taking* has been undergoing radical changes in the last few years." It is shown that Mr. Sedgwick, writing in 1857, considered it settled that in order to entitle an owner to constitutional protection and to compensation there must be an actual physical taking and that "indirect or consequential damage, no matter how serious or how clearly resulting from the exercise of the power of eminent domain," was not sufficient. The elder author disapproved of the law as so laid down and the decided trend of opinion now is that the destruction or impairment of the value of property may constitute a "taking" thereof.

Mr. Lewis remarks in section 65 (56):

"It may be laid down as a general proposition, based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto,* taken, and he is entitled to compensation."

This, of course, is not expressive of universally prevailing principles but is the learned author's view of what the law ought to be. He, however, cites many adjudicated cases in different jurisdictions and many statutes in various States which to a greater or less extent have effectuated this progressive and just policy. In several States, indeed, such policy has been written into their constitutions which provide, with slightly varying phraseology, that private property shall not be taken, "damaged," "injured" or "injuriously affected" for public use without just compensation.

It should ever be kept in view that in the exercise of eminent domain property is taken or damaged against the owner's will and therefore constitutions as well as statutes should be administered liberally and so as to resolve all doubts in his favor. Accordingly, as Mr. Sedgwick argued in 1857 that a "taking" ought to include a "damaging," it is now often contended that the word "property" as used in constitutions ought to include personalty as well as realty, so that if the taking of real estate necessarily involves

[1](3rd ed.) sec. 66 (57).

the destruction or damage of personal property compensation should be required to be made for the latter.

It may be noted that with regard to personal property that has passed into the form of fixtures, the tendency is liberal and just. It has been settled in New York, as well as elsewhere, that in determining what shall be classed as land the same rule applies as between vendor and vendee. In the opinion of the Appellate Division of the New York Supreme Court, First Department, in *Matter of Mayor*,[2] Mr. Justice Rumsey points out that under the

"original rule of common law everything which was affixed to the freehold was considered to be a part of it. (2 Kent Com. 343.) The law of fixtures was evolved out of a desire on the part of the courts to protect those who, having an estate less than a fee in the land, had made improvements upon it which, if they could not retain, would be lost to them, and in the effort to protect the interests of those persons there has grown up gradually a rule, in derogation of the common law, by which persons who put upon the land improvements would be permitted to retain them, unless they were so placed as that their removal would injure a portion of that which necessarily belonged to the freehold."

The learned judge further shows that there was no reason for applying in the determination of general value in condemnation proceedings such exception which had been engrafted for the benefit of tenants. As, whatever has been put upon the land by the owner, with the intention of permanent annexation, and as essential to the use which he makes of it, goes with the land itself to his vendee, it is only proper that upon a sale by compulsion the condemning party should make full compensation for the land as improved.

In the apportionment of the award, however, as between the owner of the fee and his tenant, the courts properly follow the landlord and tenant exception and, moreover, apply it liberally in favor of the tenant. Thus, for example, in *Matter of City of New York, Conron* v. *Glass*,[3] it was recognized that

" 'trade fixtures of a tenant remain personal property in the eye of the law so far as the right of removal is concerned' subject to the limitation that the removal of such fixtures must be accomplished without substantial injury to the freehold; but it is reversible error in making an award for such fixtures to introduce into such rule the further condition that the property to be removed must be susceptible of removal 'without injury to said property.' "

[2](N. Y. 1899) 39 App. Div. 589, 594.

[3](1908) 192 N. Y. 295.

Under existing authorities, therefore, justice is substantially accomplished with regard to fixtures and where the law because of its universality fails the hardship falls, as it should do, upon the vendee *in invitum* and not upon landowner or tenant.[4]

Outside of fixtures, however, the rule is laid down, citing many cases, in the last edition of Mr. Lewis's valuable treatise,[5] that "the damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid." This is a correct statement of the law in most jurisdictions, except as modified by statute, and a practical illustration will show that the ironclad rule may sometimes nullify the constitutional purpose.

Several years ago a municipal corporation, in condemning a considerable tract of land, included in the area of the "taking" a lot having on it a building which was used as a manufactory and salesroom of glue. It was proved before the Commissioners of Estimate and Appraisal that glue, in order to attain perfection in quality must, like wine, stand for a considerable time in the vat to "cure." It was also shown that because of the exceedingly viscous character of the commodity the bulk on hand would be diminished from an eighth to a quarter by the removal, first, into carrying vessels and then the transfer to storage vats at the new place of business. It was argued with much force, under the constitutional provision, that private property shall not be taken for public use

[4]Injustice to condemning parties not infrequently occurs. The writer has been informed that along the new Croton Water shed the drastic economy was adopted of setting fire to buildings that had been acquired with land] instead of selling them for such nominal price as could be obtained with the risk of their being moved off and set again as traps for compensation. The decisions in Matter of Briggs Avenue (1909) 196 N. Y. 255, and Matter of Hawkstone Street (N. Y. 1910) 137 App. Div. 630, affirmed without opinion by the Court of Appeals, will probably materially diminish the abuse of "house planting" as far as the State of New York is concerned. Those cases held that the actual intent in erecting a building on land that was about to be taken, or moving an old building on to such land, controlled, and that where because of the owner's knowledge of the proposed taking, it could not have been expected that the buildings would constitute permanent accessions, they continued personal property and could not be suffered to enhance the award.

In condemning real estate used for factory and trade purposes a substantial award is often made for business constructions and machinery. The latter are sold for a song, bought in by the original owners, and, with repairs and additions, used in a new establishment. It would, of course, conduce to mutual justice if awards could be determined under the wide discretion of arbitration proceedings with full knowledge of the facts and the commissioners were not required to follow strictly legal principles.

[5]Sec. 728 (488).

without just compensation, that as this personal property was inevitably—although it may be only incidentally—injured and in part destroyed, compensation must be made for it. In this particular instance the city authorities, very properly on the score of justice and perhaps prudentially, consented to remunerate the owner of the glue for his loss. The project to obtain a new constitutional interpretation was therefore abandoned. Such a loss as this would be comprehended in "damage to an existing business" under statutes hereafter to be considered.

Another illustration of similar loss is through damage to or extinction of a good will. In earlier days the element of locality was treated as more essential to good will than it is at present. It was defined by Lord Eldon in 1810 as "the probability, that the old customers will resort to the old place."[6] A half century later, Vice-Chancellor Page-Wood said that

"good will must mean either advantage * * * that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the late firm or with any other matter carrying with it the benefit of the business."[7]

While other factors enter into the value of good will, locality is still an important, and sometimes the principal, consideration. Compensation should therefore be made when an established business is required to move away from the place where it had been built up and to which customers are in the habit of resorting.

Although the exclusion of personal property from compensation, is an example of arrested development, it is not altogether probable that the courts, unassisted by statute, will further evolve the law. An impediment may be found in considerations of expediency, and an analogy is offered by the refusal of a large number of American courts of last resort to sanction recoveries for personal injuries resulting from negligence, where there was no direct physical contact but merely mental suffering or fright, and its consequential bodily effect. The disqualification extends beyond cases of simple subjective distress, as in those of grief through the non-delivery of telegrams announcing illness or impending death, and applies where a serious fright produced through unquestionable negligence results in actual physical injury.[8] The avowed reason for

[6]Cruttwell *v.* Lye (1810) 17 Ves. Jr. 335, 346.

[7]Churton *v.* Douglas 2 M. D. & DeG. 294. See also definitions of "good will" collated by Judge Vann in People *ex rel.* A. J. Johnson Co. *v.* Roberts (1899) 159 N. Y. 70.

[8]Mitchell *v.* Rochester Ry. Co. (1896) 151 N. Y. 107.

the arbitrary distinction, which admittedly works injustice in many cases, is that the recognition of the opposite rule would lead to a vast flood of speculative or fraudulent litigation and, according to preponderating public considerations, the remedy must be denied altogether. It is probable that if the right to recover for damages in condemnation proceedings were generally extended to include the damaging of personal property all manner of groundless and fanciful claims would be presented, and this portent would tend to fortify judicial conservatism, even if the innovation were urged in a strong case, such as that of a glue manufacturer.

Notwithstanding the general rule, several sporadic decisions, without elaborate discussion of constitutional rights, have declined to disapprove the allowance of remuneration for personal property where the equitable grounds were meritorious. It is, moreover, well settled by numerous authorities, that a legislature is not restricted to such measure of compensation as a constitution shall prescribe but may go further to promote justice. In *Earle* v. *Commonwealth*,[9] referring to compensation made under a statute to a practicing physician for injury to his business, Chief Justice Holmes said:

"Very likely the plaintiff's rights were of a kind that might have been damaged if not destroyed without the constitutional necessity of compensation. But some latitude is allowed to the Legislature. It is not forbidden to be just in some cases where it is not required to be by the letter of the paramount law."

The status is somewhat the same as when a legislature provides for the determination and payment of claims against the State.[10] With regard to such matters, while it is not necessary that the circumstances disclose what would constitute a legal cause of action as against an individual, it is essential that substantial merits exist. In order for the validity of such a statute the beneficiary must either have conferred a substantial public benefit or suffered a substantial loss through public instrumentality. It will presently be shown that mere gifts of public money are abhorrent.

A policy of statutory amelioration of hardship as to personal property has been inaugurated which resembles the correction of narrow interpretation of a real estate "taking" by constitutional amendment. A statute of New York and another one of Massachusetts—especially the latter—have received considerable notice from the courts.

[9](1902) 180 Mass. 579.

[10]Cole *v.* New York (1886) 102 N. Y. 48; McDougall *v.* Same (1888) 109 N. Y. 73; O'Hara *v.* Same (1889) 112 N. Y. 146.

By chapter 724 of the New York Laws of 1905, as amended by chapter 314 of the Laws of 1906, a right to damages is given to any person who on a date named had an established business in the counties of Ulster, Albany or Greene, which may have been directly or indirectly decreased in value by reason of the acquiring of land in said counties for an additional supply of water to the City of New York. Indemnity to employees of manufacturing establishments or established businesses in said three counties is also provided for, the same not to exceed the amount of wages for six months.

By chapter 488 of the Massachusetts statutes of 1895, the legislation being for the acquirement of a reservoir or public water supply, compensation was provided for damages to established businesses on land in West Boylston and for indemnity to employees for loss of employment.

The New York act has been before the Appellate Division of the Supreme Court and the Court of Appeals in *People ex rel. Lasher* v. *City of New York*.[11] These decisions, however, are not of general importance save upon one point, and this, indeed, involved a question of already well settled constitutional law. It was laid down that a city that has accepted authority to exercise the right of eminent domain is bound by conditions imposed in the statute and cannot attack its constitutionality. This principle disposes, in advance, of a large number of questions that probably would be raised, that is, all the constitutional criticisms that might be made by condemning corporations.

It is, nevertheless, possible that such sweeping disqualification would not be applied to objections to the compensation of employees for loss of wages. If persons have been employed for definite terms it might in a spirit of liberal interpretation be held that such contracts constitute property rights, or quasi-property rights. Moreover, in order for just and full compensation for damage to an established business, it may be necessary for the condemning party to save its owner harmless from, by assuming responsibility for, his agreements with his employees. Otherwise he might be required to continue the payment of salaries though the employees did not and could not continue to render service.

If, on the other hand, the terms of employment are simply payment at so much per day or per week, with the liability to discharge at any time, it is difficult to perceive how an indemnity

[11](N. Y. 1910) 134 App. Div. 75; (1910) 198 N. Y. 439.

for wages for an arbitrary period can be viewed as anything but a gift. In the leading case of *Loan Association* v. *Topeka*[12] it was laid down that, independently of constitutional restrictions and as an inherent limitation upon the power of government, money raised by public taxation cannot be applied to a private purpose. In the opinion, Mr. Justice Miller gives the radical illustration of implied restriction upon sovereign right that

"No court, for instance, would hesitate to declare void a statute which enacted that A. and B., who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D."

Conceding as a general principle that the privilege of exercising the right of eminent domain must be accepted *cum onere*, and that a municipal corporation will not be permitted to urge constitutional defects, it might nevertheless be held that the city was not precluded from objecting to an intrinsic perversion of taxation, to an application of public money that was *ultra vires* all government. Furthermore, if the condemning party itself would not be heard to complain, and perhaps as the better remedy to be employed in any view, it is believed that a taxpayer's action would lie to test the validity of such legislation. A gift of the funds of a municipality would constitute a waste or illegal application of its funds, within the meaning of acts authorizing suits by resident taxpayers, and it would seem that the courts would entertain such a proceeding to restrain, in whole or in part, the effectuation of a statute requiring payment of unearned wages where no definite contract for the future exists.[13] Such contention would be a proper one, not only, theoretically, because the claim for future wages cannot be regarded as a vested right, but also, practically, because public subsidies of this kind would have a demoralizing and harmful tendency. Unhampered legislative power in this respect might lead to grave demagogic abuses.

It is the opinion of the writer that a person discriminated against as a beneficiary without adequate ground for classification ought to be heard to attack the statute, because denying the equal protection of the laws, if he apply in time to stay the work *in limine*.[14] This point was raised in *Whiting* v. *Commonwealth*[15]

[12](1874) 20 Wall. 655.

[13]Bush *v.* Supervisors (N. Y. 1896) 10 App. Div. 542; Mercer *v.* Floyd (N. Y. 1898) 24 Misc. 164.

[14]Chadwick *v.* Kelley (1903) 187 U. S. 540.

[15](1907) 196 Mass. 468.

under the West Boylston statute, and, while the decision was doubtless correct, the discussion is not satisfactory. That act, as already shown, provides for damages to established businesses and for indemnity for future wages. It is also enacted that no stockholder of any corporation whose plant is taken shall be entitled to compensation. The petitioner was both a stockholder and an employee of a corporation and the opinion of the Supreme Judicial Court concludes with this language:

"The petitioner contends that unless the construction for which he argues is given to the statute, § 4 of c. 450, St. 1896, providing that no stockholder in any corporation whose plant is taken on account of a reservoir for the metropolitan water supply shall be entitled to compensation under that act, is unconstitutional, on the ground, as we understand him, that it would constitute an arbitrary and unjust discrimination against a stockholder who might also be an employee. But an employee as such is not entitled to damages for the loss of employment. And the Legislature might well provide that one who is a stockholder and as such entitled to receive compensation for the taking of the property of the corporation shall not be entitled to recover damages for loss of employment. Loss of business is not, generally speaking, an element of damage in a taking by right of eminent domain (*Bailey* v. *Boston & Providence Railroad,* 182 Mass. 537), and there is, therefore, nothing unconstitutional in an act which provides that one whose property is taken shall not recover damages for loss of business, even though parties differently situated are allowed to recover therefor."

Under the right to regulate corporations, legislation excluding persons who are stockholders from receiving compensation whether as employees or otherwise may well be sustained, even though the right to compensate ordinary employees be conceded. It may be that the application of the entire language is restrictable to employees. But "loss of employment" and "loss of business" are treated as convertible terms and, taking the extract as a whole, an implication is suggested that because a right to compensation has not existed before, it may be conferred with discrimination or arbitrarily. Such inference is not certainly to be drawn because reference is made to "parties differently situated" and as to such persons discriminations may always be made.

As the writer has already endeavored to show, mere gifts are absolutely illegitimate. When a new form of compensation, or compensation on new grounds, is enacted, it should not be viewed as a gratuity but as representing a broadened, more progressive sense of the duty of remuneration, and, while a certain latitude

of discretion may be assumed, the legislative authority ought still to be exercised subject to the Fourteenth Amendment of the Federal Constitution. If compensation were provided for damage to one form of retail business and nothing were said as to similar businesses dealing in other commodities but drawing their custom from the same neighborhood, the excluded merchants ought to be permitted to attack the statute because of arbitrary classification.

In the main, judicial interpretations have effectuated the statutes according to sound judgment and justice. In *People ex rel. Lasher* v. *City of New York,*[16] the proprietor of a regular boarding house was held entitled to compensation for damages to her established business. In *Gavin* v. *Commonwealth,*[17] on the other hand, it was decided that a widow, whose eight children working in a mill live with her paying board, and whose two nieces and their aunt occasionally board with her during their summer vacations, is not an individual "owning an established business" within the meaning of the West Boylston Act. In *Earle* v. *Commonwealth,*[18] it was held that a practicing physician, living and having his office in a house in West Boylston belonging to his wife, is an indivdaul owning "an established business on land in the town of West Boylston" and entitled to damage to the amount his business is decreased in value by the carrying out of the West Boylston Act. The following is from the opinion of Chief Justice Holmes:

"Next it is contended that the petitioner was not an 'individual * * * owning * * * an established business on land in the town of West Boylston' within the meaning of § 14. A majority of the court does not see why not. The defendant cites *Ex parte Breull,* 16 Ch. D. 484, for the proposition that the word 'business' has no definite technical meaning. We agree, and think it quite wide enough to include the practice of a doctor. It is suggested that the practice was not established on land in West Boylston. It is true that a doctor can give advice elsewhere than in his office, and that in fact he does so to a greater extent that a shopkeeper sells his goods outside his shop. But no less than a shopkeeper a doctor usually has, as the petitioner had, a locally established centre to which patients resort, and from which he goes his rounds. There is even a certain amount of salable good will, as is made familiar to us by English law and literature as well as by an occasional case in our own reports. *Smith* v. *Bergengren,* 153 Mass. 236."

The spirit of this language may be taken as a general guide.

[16] *Supra.*

[17] (1902) 182 Mass. 190.

[18] *Supra.*

For example, a statute expressly discriminating between a doctor and a lawyer, or a finding by commissioners that a doctor's business was and a lawyer's business was not, damaged, could be upheld on the ground of the more essentially local character of a doctor's, than a lawyer's, practice.

It is believed that the New York and Massachusetts statutes will be generally copied and their scope considerably extended, and in such event constitutional questions may become important. The writer realizes that the bearing of the Fourteenth Amendment is *terra incognita.* Most of the decisions that have condemned legislation because of groundless classification were at the suit of one aggrieved by an affirmative burden, penalty, or disqualification. In cases contemplated by the present discussion the alleged arbitrary discrimination would have to be raised not because of invasion of the plaintiff's former rights or immunities, but because other parties were granted additional rights from which he continued to be excluded. At first blush it might be said that the constitution may not be invoked in aid of a mere dog in the manger. There is, as already shown, a suggestion of this view in the extract above quoted from the opinion in *Whiting* v. *Commonwealth,* the only case known to the writer that touches on the point at all.[19]

But if legislation of this kind increases it may prove intolerable to leave open such a wide source of favoritism and jobbery as the arbitrary discretion to enact just what personalty shall or shall not be paid for in the course of a public improvement. Constitutional provisions are to be broadly construed in furtherance of the end in view. If allowances for personal property are to be viewed as compensation and not gratuity it is equally repugnant in spirit to the guarantee of equal protection of the laws whether two persons of the same circumstances and class be unequally indemnified or unequally mulcted.

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[19]Somewhat the same idea crops out in the opinion of the court in of which Chief Justice Holmes speaks of indemnity for the injury to business as "an act of supererogation" and even as a "gratuity." We assume that in this *dictum* and especially in the use of "gratuity" the learned jurist intended to be taken colloquially and not scientifically.